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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1940

LEROY A. HENRY, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 383) is reported in 111 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940 (R. 387). The petition for a writ of certiorari was filed on August 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was substantial evidence that petitioner incurred total permanent disability on or prior to August 31, 1919.

2. Whether, in the absence of a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals had authority to dismiss the petition upon reversing the judgment for error in denying respondent's motion for a directed verdict.

RULES AND REGULATIONS INVOLVED

Treasury Decision No. 20, issued by the Bureau of War Risk Insurance, Treasury Department, on March 9, 1918 (see Regulations & Procedure of the United States Veterans' Bureau, Vol. I, p. 9), defines total permanent disability, for insurance purposes, as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States, provides, in part, as follows:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied

> or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * *

STATEMENT

Petitioner, Leroy A. Berry, filed in the District Court for the District of Vermont on April 6, 1936, a petition seeking to recover total permanent disability benefits under two contracts of yearly renewable term insurance, which were issued on December 1, 1917, and April 12, 1918, respectively, and remained in force until August 31, 1919 (R. 1, 3–6). Petitioner alleged (R. 2–3), and the Government denied (R. 8), that he became totally and permanently disabled while the insurance was in force.

In the first trial, concluded on November 18, 1937, the jury reported a disagreement (R. 1). The second trial was held before Judge Howe and a jury of twelve at Montpelier, Vermont, during March of 1939 (R. 1). After the introduction of all the evidence, respondent moved for a directed verdict upon the ground that there was no substan-

tial evidence to show the alleged total and permanent disability (R. 250–251). The motion was denied (R. 251). A verdict was returned for petitioner and judgment was entered on the verdict on May 17, 1939 (R. 257).

A motion for judgment notwithstanding the verdict, permitted by Rule 50 (b), *supra*, was not made before the District Court. Upon appeal, the Circuit Court of Appeals for the Second Circuit held that, since there was no substantial evidence to support the verdict, the District Court had erred in not granting the respondent's motion for a directed verdict. It therefore reversed the judgment with instructions to dismiss the petition (R. 387).

ARGUMENT

1. Petitioner suffered the amputation of his left leg, about five inches below the knee, with attendant neuroma and nervousness. Scar tissue up to the right thigh resulted from flesh wounds. He claims a conflict of decisions (Pet. 15–16) because verdicts in other cases involving physical impairment of the same general character have not been disturbed.

(a) The policies sued on do not insure against any particular injury or ailment, but only against total permanent disability, that is, a disability which prevents the pursuit of any substantially gainful occupation and is reasonably certain to be permanent. (Treasury Decision No. 20, *supra*).

Whether such disability exists depends as much in each case upon the occupation, personality, education, and opportunity of the insured as upon the nature of his injury or disease. *Lumbra* v. *United States*, 290 U. S. 551, 559; *United States* v. *Green*, 69 F. (2d) 921, 922 (C. C. A. 8th).

(b) Moreover, regardless of the nature of his injury, actual performance of work by the insured may conclusively demonstrate that he is not totally and permanently disabled. It may be true, as petitioner contends, that the bare fact of gainful employment does not conclusively negative total and permanent disability, *United States* v. *Rice*, 72 F. (2d) 676 (C. C. A. 8th, 1934). Nevertheless, the insured may not recover for total and permanent disability, irrespective of the character of his injury, if the evidence indicates that he has substantially engaged in gainful employment, *Lumbra* v. *United States, supra,* at 561; *United States* v. *Spaulding*, 293 U. S. 498.

In this case there is undisputed evidence that between 1920 and the time his action was tried petitioner engaged in gainful employment over extended periods of time. This uncontroverted evidence also proves that petitioner's work was performed to the satisfaction of his employers, and that it resulted in substantial earnings. Such proof conclusively dissipates any inference that petitioner had become totally and permanently disabled. *Lumbra* v. *United States, supra,* at 561.

This evidence is set out in the Appendix, *infra*, pp. 9–13.

(c) The cases cited in petitioner's brief are not in conflict with the judgment of the court below. Neither in *United States* v. *Dupire*, 101 F. (2d) 945 (C. C. A. 8th), in *Thomas* v. *United States*, 92 F. (2d) 929 (C. C. A. 5th), nor in *United States* v. *Scarborough*, 57 F. (2d) 137 (C. C. A. 9th), was there evidence, or even a contention, that the insured had engaged in gainful employment at any time after injury. In both *United States* v. *Rice*, 72 F. (2d) 676 (C. C. A. 8th), and *United States* v. *Suomy*, 70 F. (2d) 542 (C. C. A. 9th), the question was simply whether the work in which the insured had engaged was of a sufficiently substantial character to make untenable an inference that he had been totally and permanently disabled. The permissibility of such an inference must necessarily be judged upon the facts proved in the individual case.

The opinion of the Court below reflects a recognition of the applicable principles of law, stated by this Court in *Lumbra* v. *United States*, 290 U. S. 551; *United States* v. *Spaulding*, 293 U. S. 498, rehearing denied, 294 U. S. 731; and *Miller* v. *United States*, 294 U. S. 435, rehearing denied, 294 U. S. 734, and by the various Circuit Courts of Appeals in numerous other cases. No question calling for further elucidation of those principles is here in-

volved and their application to the evidence in this case presents no occasion for review in this Court.

2. The Circuit Court of Appeals, upon reversing the judgment, was not required to grant a new trial. Respondent's motion for a directed verdict having been denied, the case was submitted to the jury, "subject to a later determination of the legal questions raised by the motion" (Rule 50 (b), *supra*). Since the legal question raised by the motion was decided by the Circuit Court of Appeals in respondent's favor, its direction to dismiss, and its failure to grant a new trial, fully accord with the decision in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654. It was there held that a circuit court of appeals may reverse a judgment, entered on the verdict of a jury, and direct that the complaint be dismissed on the merits in the event the district court reserved its decision on a motion to direct a verdict in favor of the defendant. It follows, under that decision, that the only significant question is whether the district court has reserved power (by using the formula of reserving decision on the motion) to determine the legal question, raised by the motion, after receipt of the verdict; if it has, the circuit court of appeals on review may direct that the complaint be dismissed on the merits. Rule 50 (b), *supra*, provides in effect that the district court, before which the motion is made, will in every case be deemed to have reserved such power.

The reference in Rule 50 (b), to a motion to set aside the verdict and enter judgment in accordance with the motion for a directed verdict, merely indicates the procedure for invoking action by the district court. Neither the making of that motion nor the failure to make seems to have any bearing upon the right of the Circuit Court of Appeals to take the action approved in the *Redman* case. See Proceedings of the Institute on Federal Rules (Cleveland, Ohio, July 1938), pp. 313, 350, 383; *id.* (Washington, D. C., October 1938) pp. 85, 86, 126; *id.* (New York City, October 1938), pp. 281, 328, 330, 331, 336. Compare *Conway* v. *O'Brien*, 111 F. (2d) 611, 613 (C. C. A. 2d).

CONCLUSION

The decision of the Circuit Court of Appeals was correct. There is no conflict of decisions and no question which warrants further review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1940.

APPENDIX

The health and employment record of petitioner, after the expiration of his insurance policies, may be summarized as follows:

From the 1st of February 1921, until April 15, 1923, petitioner followed a course of vocational training as an automobile mechanic. He worked in private garages and received his wages in part from the Government and in part from the shop owner. Records of his absences from work during this period show the following:

> February 1921: Two days to go to Boston to have leg attended to (R. 346).
>
> March 1921: Six days. The report assigns as the reason, "Had to quit" (R. 347). However, it was testified that petitioner quit because of a quarrel with the foreman which had nothing to do with his physical condition (R. 138).
>
> May 1921: Two days to change shops (R. 348).
>
> September 1921: One and one-half weeks. Sick with influenza (R. 349).

A report dated November 8, 1921, stated:

> Attendance of trainee, Fair (has been sick quite a little).
>
> * * * * *
>
> REMARKS: During the summer months we paid trainee $2.50 [1] a day, during which time

[1] This has reference to payments by the shop owner in addition to vocational training pay allowed by the Government (R. 319).

he was here practically all the time. However, about a month and a half ago, the summer rush being over, and the need of the services of trainee were considerably lessened, the above-mentioned rate of $1.00 a day was agreed upon. Since this time his attendance has dropped off, averaging the past few weeks not over two-thirds of time each week (R. 350).

November and December 1921: Twelve days because of injury to knee on the amputated leg (R. 35).

December 1921 and January 1922: Twelve days because of abscess on stump of leg. Operated on by Dr. Tierney and ordered to Boston to be measured for new artificial limb (R. 353).

February 1922: Three days. Reason not given (R. 353).

March 1922: Two days. Went to Boston to get new artificial limb fitted (R. 354).

April 1922: One day. Reason not given (R. 355).

May 1922: Three days. Reason not given (R. 356), and home on account of injury to arm while cranking car, five days (R. 358).

November 1922: One day. Sick (R. 359).

December 1922: One and one-half days on business by permission of counselor (R. 360).

February 1923: Ten days. Sick with influenza (R. 362).

There is undisputed testimony that, as a result of his vocational training, petitioner became a competent automobile mechanic (R. 63, 106, 108, 237), and that his employers regarded his work as satisfactory (R. 237, 240; see also R. 224, 232).

From April 15, 1923, to November 1923, petitioner continued his work in the same garage. But,

during this time, the entire compensation for his services was paid by the garage owner. Reports of training supervisors during this period indicate:

> July 25, 1923. "Man rehabilitated as auto mechanic. Working for the St. Johnsbury Garage where he finished his training. Is doing good work and is well liked." (R. 366.)
>
> October 19, 1923. "Working for the St. Johnsbury Garage, St. Johnsbury, Vt. Doing well. Receiving $25.00 per week salary." (R. 366.)

From February 14 to December 31, 1930, petitioner was employed on commission as a salesman for the Aluminum Cooking Utensil Company. His sales, aggregating $2,194.00, measured up to the average production of about 1,000 salesmen who were then employed by that company (R. 246–248). The assistance rendered by his wife with respect to this work was restricted to the cooking of food and the washing of dishes in connection with dinners served for the purpose of demonstrating the utensils. He made advance arrangements for the dinners, delivered the sales talks, and personally interviewed all the prospective purchasers. While, in making calls, his wife sometimes drove the car for him (R. 249), the petitioner has driven an automobile since 1920, except, as he testified, "Not always; there has been times I couldn't" (R. 136).

Work admittedly performed by petitioner between November 1923 and February 1930 (R. 36–40, 60), was not shown by contemporaneous records. However from 1924 to 1928, he performed some of the work on the farm where he lived and,

in addition—according to his written summary, dated February 14, 1930—was employed as follows:

> Nov. 1922 to Jan. 1924, Mechanic, St. Johnsbury, L. C. Benoit, St. Johnsbury Garage, St. Johnsbury, Vt.; Jan. 1924 to May 1928, Prop., Sheffield, Vt., Berry Garage, Sheffield, Vt.; May 1928 to Jan. 1929, Mechanic, Lyndonville, Vt., J. E. Nadeau, Depot Garage, Lyndonville, Vt.; Jan. 1929 to Jan. 1930, Prop., Lyndonville, Vt., South End Garage, Lyndonville, Vt.; Jan. 1930 to Feb. 1930, Salesman, Lyndonville, Vt., L. D. Ratta, Air-Ways, Inc., Manchester, N. H. (R. 335; see also R. 343–344).

Subsequent to December 1930, petitioner sold spot remover, vacuum cleaners, and wrenchies, each for a short period; worked about two weeks running an air compressor on a P. W. A. sewer project (R. 41); drove a truck hauling stone (R. 41, 109, 332), and logs (R. 207) for a few months; worked for wages in a service station (R. 48–49); did special repair jobs at his home for friends and acquaintances (R. 42, 225); and ran a filling station of his own for six months (R. 42, 155).

At the time of his discharge from the service, petitioner claimed disability only by reason of his amputated leg (R. 284); in his application for compensation executed on June 6, 1919, he asserted only that claim (R. 331); and in his several applications for a driver's permit, he certified that he had no other disability (R. 322, 325). He applied for and received two policies of insurance with private insurance companies (R. 139, 140–143), and at least in one of his applications, executed in 1928, he

certified that he was in good health, having no physical or mental infirmity other than the loss of the left leg (R. 338); that he had received no medical treatment during the preceding five years, other than an appendectomy in April 1928; and that during the preceding five years he had lost time from work by reason of illness only at the time of the appendectomy (R. 339).

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